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6 UNITED STATES BANKRUPTCY COURT
7
8 FOR THE DISTRICT OF ARIZONA

9 In re:) Chapter 13 Proceedings
10)
11) Case No. 0:11-bk-19648JMM
12 DANIEL BARBARA and)
13 LEE ANNE BARBARA,) Adversary No. 0:11-ap-01514-JMM
14)
15 Debtors,) RESPONSE TO ADVERSARY COMPLAINT
16) AND MOTION FOR FINDING OF CIVIL
17) CONTEMPT FOR VIOLATION OF
18) AUTOMATIC STAY
19)
20 DANIEL BARBARA and)
21 LEE ANNE BARBARA,)
22)
23 Plaintiffs,)
24)
25 v.)
26)
27 KRISTY OSIUS,)
28 MELINDA SILK, Attorney,)
29)
30 Defendants.)
31)
32)

21 COMES NOW the Defendants, KRISTY OSIUS and MELINDA
22 SILK, by and through undersigned counsel, and as and for their
23 Response to Plaintiffs' Adversary Complaint and Motion for
24 Finding of Civil Contempt for Violation of Automatic Stay,
25 allege and state as follows:
26

1 First and foremost, Defendants did not violate the
2 Automatic Stay in this matter. Defendant Osius, through her
3 attorney, Defendant Silk, filed a post decree Petition for
4 Civil Contempt prior to Plaintiff's filing for bankruptcy.
5 Once Plaintiff filed for bankruptcy relief, such filing does
6 not preclude the Defendants from attempting to obtain relief
7 from the Automatic Stay, pursuant to 11 USCA Section 362 (b)(2)
8 of the United States Bankruptcy Code. A request for relief
9 from an Automatic Stay in itself, is not a violation of the
10 Automatic Stay and as such, does not warrant the issuance of
11 sanctions against either of the Defendants.

12 Plaintiffs' bankruptcy and the allegations set forth
13 in the instant complaint are yet another veiled attempt by
14 Daniel Barbara to manipulate the system into legally assisting
15 and condoning his violation of the terms and conditions set
16 forth in the Defendant, Kristy Osius, and Mr. Barbara's Decree
17 of Dissolution of Marriage. Plaintiffs' allegations are
18 nothing more than conjecture, speculation and/or untruths that
19 do not warrant individual denials by the Defendants.
20 Defendants deny each and every allegation that is not a
21 material statement of fact in Plaintiffs' complaint.
22 Plaintiffs' own exhibits clearly demonstrate and reinforce why
23 it was necessary for Defendants to request relief from the
24 Automatic Stay.
25
26

1 When the dissolution case went to trial, Mr. Barbara
2 testified in open Court that he had no intention of filing for
3 bankruptcy relief. Based upon this declaration, Kristy Osius,
4 was awarded virtually none of the parties' community assets, in
5 return for Mr. Barbara being responsible for all of the
6 parties' community debt. Mr. Barbara led Ms. Osius to believe
7 for over a year, that he had hired a firm to handle the payment
8 of the community debt. Even after Ms. Osius confirmed with the
9 creditors that Mr. Barbara was not abiding by the Mohave County
10 Superior Court's orders, Mr. Barbara vehemently insisted that
11 he was handling it.

12 After approximately one (1) year of Mr. Barbara
13 stringing Ms. Osius along with false assurances and
14 accusations, Ms. Osius filed a Petition for Civil Contempt with
15 the Mohave County Superior Court on April 25, 2011. On May 11,
16 2011, said Court set the matter for hearing on September 23,
17 2011.

18 It wasn't until after Ms. Osius filed her Petition
19 for Civil Contempt and the Court set a hearing date, did Mr.
20 Barbara, in an effort to negate the aforementioned obligations,
21 file for bankruptcy on July 8, 2011.

22 On July 26, 2011, Mr. Barbara's attorney in the
23 dissolution matter filed a Motion and Notice of Chapter 13
24 Bankruptcy Filing and Statement Regarding Said Filing. On
25 August 12, 2011, undersigned counsel filed on behalf of Ms.
26

1 Osius a Response to Respondent's Motion and Notice of Chapter
2 13 Bankruptcy Filing and Statement Regarding Said Filing and
3 Motion for Relief From Final Order, pursuant to Rule 35(A)(3)
4 of the Arizona Rules of Family Law Procedure, which states in
5 part as follows:

6 ...

7 Rule 35. Family Law Motion Practice

8 **A. Formal Requirements; Time Periods.**

9 3. Any party opposing the motion shall file any
10 answering memorandum within ten (10) days thereafter.
11 An answering memorandum shall be titled "Response to
12 _____ (name of motion)."

13 ...

14 Undersigned counsel had a Court required duty and a legal duty
15 to her client, Ms. Osius, to file a proper Response to the
16 aforementioned Motion. This mandatory filing in no way can be
17 construed as a violation of the Automatic Stay; and therefore,
18 Plaintiffs have no grounds to request sanctions issued against
19 the Defendants.

20 In addition, on or about September 1, 2011,
21 undersigned counsel filed an Ex Parte Motion for Order
22 Confirming Inapplicability of Automatic Stay, Pursuant to 11
23 U.S.C. § 362(b)(2) with the United States Bankruptcy Court.

1 **LEGAL ARGUMENT**

2 Defendant and Defendant's Attorney are entitled to file a
3 Motion for Relief from the Automatic Stay Pursuant to 11 U.S.C.
4 § 362 with the United States Bankruptcy Court, which provides
5 as follows:

6 On request of a party in interest and after
7 notice and a hearing, the court shall grant
8 relief from the stay provided under subsection
9 (a) of this section, such as by terminating,
annulling, modifying, or conditioning such stay
... .

10 (1) for cause, including the lack of adequate
11 protection ...

12 Typically, motions for relief from the automatic stay are
13 initiated by a creditor. Generally, it is the creditor whose
14 interest is allegedly not being properly protected by the
15 debtor. [Section 362\(d\)](#), however, allows any party in interest
16 to request relief from the automatic stay. Defendant is such a
17 party in interest, and, therefore may bring a Motion for Relief
18 from the Automatic Stay.

19 The phrase "for cause," referred to in [§ 362\(d\)](#)
20 frequently refers to a lack of adequate protection or some
21 adverse circumstance to which the stay of [§ 362](#) binds a
22 creditor. It has been held, however, that cause for lifting
23 the automatic stay "may include permitting a debtor to continue
24 proceedings in another tribunal." [In re Ionosphere Clubs,](#)
25 [Inc.](#), 105 B.R. 765, 770 (Bankr. S.D.N.Y. 1989). The United
26 States Court of Appeals for the Ninth Circuit has repeatedly

1 recognized that there is "cause" shown and the automatic
2 stay should be terminated when there is a pending state court
3 case involving state law issues. In re Tucson Estates,
4 Inc., 912 F.2d 1162, 1166 (9th Cir. 1990); In re Castlerock
5 Properties, 781 F.2d 159, 163 (9th Cir.1986); In re Kemble, 776
6 F.2d 802, 807 (9th Cir. 1985).

7 This proposition is further supported in the
8 legislative history to 11 U.S.C. § 362 which provides:

9 The lack of adequate protection of an interest
10 in property of the party requesting relief from
11 the stay is one cause for relief, but is not the
12 only cause ... a desire to permit an action to
13 proceed to completion in another tribunal may
14 provide another cause. House Report No. 95-
15 595, 95th Cong., 1st Sess. 343-4 (1977); cf.
16 Senate Rpt. No. 95-989, 95th Cong., 2d Sess. 52-
17 3 (1978).

18 Here, the filing of the bankruptcy herein has stayed Defendant
19 from proceeding with the post decree matter, and Defendant is
20 requesting relief of the automatic stay so that she may
21 proceed. Based on the decisions in Ionosphere, Tucson Estates,
22 Castlerock Properties, and Kemble along with the congressional
23 intent, Defendants' basis for requesting relief satisfies the
24 "for cause" requirement of § 362(d)(1).

25 Relief from the automatic stay may be granted "for
26 cause," 11 U.S.C. §362(d)(1). "Cause" for lifting the stay has
generally been held to include domestic matters, which should
be determined in a state court where expertise in such issues
lies. In re Robbins, 964 F.2d 342 (4th Cir. 1992); Carver

1 v.Carver, 954 F.2d 1573, 1578 (11th Cir. 1992); In re Simpson,
2 140 B.R. 857 (Bkrtcy.E.D.Pa. 1992); In re El-Amin, 126 B.R.
3 855, 859 (Bkrtcy.E.D.Va, 1991); In re White, 851 F.2d 170 (6th
4 Cir. 1988); In re MacDonald, 755 F.2d 715 (9th Cir. 1985); In
5 re Graham, 14 B.R. 246, 248 (Bkrtcy.W.D.Ky.1981); Schulze v.
6 Schulze, 15 B.R. 106, 108-109 (Bkrtcy.S.D.Ohio 1981).

7 Additionally, relief from the stay should be granted
8 to allow the for the collection of post-petition support,
9 interest, costs, and fees where such collection is otherwise
10 prohibited by the automatic stay (e.g. where the property of
11 the estate has not re-vested in the debtor), In re
12 Jacobson, 231 B.R. 763 (Bkrtcy.D.Ariz. 1999). In the instant
13 case, Plaintiff testified in open court at the trial level that
14 he had no intention of filing for bankruptcy relief (see page
15 10 of the Amended Decree of Dissolution of Marriage under
16 Findings No. 33). Based upon this declaration, Defendant was
17 awarded virtually none of the parties' community assets, in
18 return for the Plaintiff being responsible for all the parties'
19 community debt. (See pages 17& 18 of Amended Decree of
20 Dissolution of Marriage, under Orders No.(4)(a)(i) thru (xxix).
21 The trial court's equitable division of community debts,
22 spousal maintenance, property allocation and equalization
23 payments was effectively and immediately destroyed when
24 Plaintiff filed for Chapter 13 Bankruptcy.
25
26

1 Normally, when the bankruptcy court does not
2 determine which debts are discharged, the state court has
3 concurrent jurisdiction to make that determination. Steiner v.
4 Steiner, 179 Ariz. at 611-12, 880 P.2d at 1157-58; Beckmann,
5 685 P.2d at 1049-50. The trial court's order of authority was
6 limited by the bankruptcy court's order lifting the bankruptcy
7 stay in Birt v. Birt, 208 Ariz. 546 (2004), 96 P.3d at 544.
8 (Order authorizing Wife to seek to "reopen and examine the
9 equity of the property distributions, debt allocations and
10 support provisions but denied her request to proceed with an
11 action to determine the dischargeability of obligations in
12 [state court] and bring such actions to the United States
13 Bankruptcy Court." . . . "Given this limitation and the
14 circumstances of this case, granting Defendant Rule 60(c)(6)
15 relief could not interfere with a determination of what debts
16 were discharged or result in an "end run' around the discharge.
17 Ultimately the Bankruptcy Court will determine what debts were
18 discharged." Id. at 546. An order in Birt lifting the stay
19 permitting Defendant to seek relief from the Arizona Superior
20 court, making clear that a Rule 60 motion would not violate the
21 bankruptcy stay.
22

23 When a debtor files for bankruptcy, he is immediately
24 protected by an automatic stay under 11 U.S.C. § 362(a), which
25 provides that a bankruptcy petition, among other things,
26

"operates as a stay, applicable to all entities,
of the commencement or continuation ... of a

1 judicial, administrative, or other action or
2 proceeding against the debtor ...; the
3 enforcement ... of a judgment ...; any act to
4 obtain possession of property of the estate ...;
5 [and] any act to create, perfect, or enforce any
6 lien...."

7 It does not, however, prevent the commencement or
8 continuation of a civil action in certain circumstances. 11
9 U.S.C. § 362(b)(2)(A)-(B). Relief from the automatic stay may
10 be granted "for cause," 11 U.S.C. §362(d)(1). "Cause" for
11 lifting the stay has generally been held to include but is not
12 limited to domestic matters, which should be determined in a
13 state court where expertise in such issues lies. In re Robbins,
14 964 F.2d 342 (4th Cir. 1992); Carver v. Carver, 954 F.2d 1573,
15 1578 (11th Cir. 1992); In re Simpson, 140 B.R. 857
16 (Bkrtcy.E.D.Pa. 1992); In re El-Amin, 126 B.R. 855, 859
17 (Bkrtcy.E.D.Va, 1991); In re White, 851 F.2d 170 (6th Cir.
18 1988); In re MacDonald, 755 F.2d 715 (9th Cir. 1985); In re
19 Graham, 14 B.R. 246, 248 (Bkrtcy.W.D.Ky.1981); Schulze v.
20 Schulze, 15 B.R. 106, 108-109 (Bkrtcy.S.D.Ohio 1981). We have
21 a change in circumstances within months of the decree caused by
22 Plaintiff's disappointed by the trial court's final ruling.
23 Additionally, relief from the stay should be granted to allow
24 the collection of post-petition support, interest, costs, and
25 fees where such collection is otherwise prohibited by
26 the automatic stay (e.g. where the property of the estate has
 not re-vested in the debtor), In re Jacobson, 231 B.R. 763

1 (Bkrtcy.D.Ariz. 1999). Whatever disagreements Plaintiff may
2 have, the fact remains that the Automatic Stay has afforded him
3 an opportunity to avoid the enforcement tools that would give
4 him reasons to pay the support he owes.

5 State and federal courts have held that a bankruptcy
6 discharge of debts allocated in part to one of the parties to
7 the divorce can constitute a change of circumstances to permit
8 a modification of the property allocation, alimony and child
9 support. Hopkins. V. Hopkins, 487 A.2d 500, 504 (R.I. 1985).
10 Consistent with this view, the Ninth Circuit held that when an
11 ex-husband obtained a bankruptcy discharge of a property debt
12 he owed his wife for the value of his medical practice pursuant
13 to a prior divorce decree, the non-debtor spouse properly
14 sought increased alimony from the divorce court based on a
15 change of circumstances. Siragusa v. Siragusa, 27 F.3d 406,
16 408-409 (9th Cir. 1994). The court concluded that the modified
17 alimony was not a violation of the bankruptcy discharge and the
18 bankruptcy court properly deferred to the state court's
19 determination that the change was not a reinstatement of the
20 property settlement debt. Id. (citing In re Harrell, 754, F.2d
21 902, 907 (11th Cir. 1985) (holding that bankruptcy court
22 rulings should impinge on state domestic relations issues "in
23 the most limited manner possible").
24

25 Plaintiff cites Sternberg v. Johnston, 582 F.3d 1114
26 (9th Cir. 2009) as their most important case that Defendant and

1 Defendant's Attorney willfully violated 11 U.S.C. § 362.

2 Plaintiff's argues "the stay was violated by the attorney
3 continuing to prosecute post petition a divorce motion for
4 contempt of court that had been filed prior to the bankruptcy
5 case being filed." Plaintiffs' argument is without merit as
6 the case was appealed up to the U.S. Court of Appeals, Ninth
7 Circuit at 582 F.3d 1114 who found "the attorneys fee award
8 against Sternberg was based on the authority of this statute.
9 The bankruptcy court did not find Sternberg or anyone else to
10 be in civil contempt for violating the automatic stay, nor did
11 it impose any sanctions under its inherent civil contempt
12 authority." 582 F.3d 1114, 1122 (New footnote 3) (Emphasis
13 added).

14
15 Although Plaintiffs are not attorneys, Plaintiffs are
16 not providing complete candor to the court as required by Rule
17 3.3 of the Model Rules of Professional Conduct which states:

18
19 (a) A lawyer shall not knowingly: (1) make a false
20 statement of fact or law to a tribunal or fail
21 to correct a false statement of material fact or
22 law previously made to the tribunal by the
23 lawyer; (2) fail to disclose to the tribunal
24 legal authority in the controlling jurisdiction
25 known to the lawyer to be directly adverse to
26 the position of the client and not disclosed by
opposing counsel. . .

27 Attorney's fees and court costs are deemed to be in the nature
28 of maintenance or child support and thus nondischargeable based
29 on state law. Magee v. Magee, 206 Ariz. 589, 592, 13-14, 81

1 P.3d 1048, 1051 (App. 2004) (requiring payment of fees by one
2 spouse on behalf of other is derived from and justified by the
3 duty of support); In re Matter of Catlow, 663 F.2d 960, 962-963
4 (9th Cir. 1981) (awarding attorney's fees in dissolution action
5 was nondischargeable under prior bankruptcy code because the
6 award fell into the same support category as spousal
7 maintenance).

8 In determining whether an obligation is in the nature
9 of alimony, maintenance or support, "the court must look to the
10 "intent of the parties and the substance of the obligation."
11 Shaver v. Shaver, 736 F.2d at 1316. A factor in characterizing
12 an obligation as one intended for support is the need of the
13 recipient spouse. *Id.* Factors indicating the need for support
14 "include the presence of minor children and an imbalance in the
15 relative income of the parties" and whether the obligation
16 terminates on the death or remarriage of the recipient
17 spouse. *Id.* In making this determination, the trial court on
18 remand can consider the purpose of A.R.S. § 25-324, In re
19 Gibson, 103 B.R. at 221, and shall clarify whether the award is
20 made only as a sanction or is based on wife's need. Cf. In re
21 Jarski, 301 B.R. 342, 346-47 (Bankr.D.Ariz. 2003). This will
22 assist the bankruptcy court in later determining whether the
23 prior award was dischargeable.
24

25 A number of cases have addressed the dischargeability
26 of attorney's fees awarded under dissolution decrees or

1 settlement agreements. The majority of these cases hold that
2 such fees are nondischargeable under [section 523\(a\)\(5\)](#) as
3 alimony, maintenance or support. See e.g. [In re Gwinn](#), 20 B.R.
4 233 (9th Cir. BAP 1982).

5 Similar to the reasoning of [Shaver](#), virtually all of
6 the cases look to the fact that the award of attorney's fees
7 was based upon the need of the recipient spouse or the
8 financial circumstances of the parties in determining that the
9 attorney fees are support. See e.g. [In re Heverly](#), 68 B.R. 21,
10 23 (Bankr.M.D.Fla.1986); see also [Jones v. Tyson](#), 518 F.2d at
11 680-81.

12 WHEREFORE, Defendants request the Court make the
13 following Orders:

14 1. Dismiss Plaintiffs' Adversary Complaint in its
15 entirety.

16 2. Deny Plaintiffs' request for sanctions against
17 the Defendants.

18 3. Deny Plaintiffs' request for attorney's fees in
19 the amount of \$2,000.00.

20 4. That attorney's fees and court costs be awarded
21 against Plaintiffs in favor of Defendants in the amount of
22 \$2,500.00.

23 5. That any and all additional relief be ordered
24 that this Court deems just and proper under the circumstances.
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DATED this 19th day of September, 2011.

SILK LAW OFFICE
59 Mulberry Avenue
Lake Havasu City, AZ 86403

s/Melinda Silk

MELINDA SILK
Attorney for Defendants,
Kristy Osius and Melinda Silk

Copy mailed this 19th day
of September, 2011, to:

DANIEL BARBARA
P.O. Box 792
Bouse, AZ 85325
Debtor/Respondent

RUSSELL BROWN
3838 North Central Avenue, #800
Phoenix, AZ 85012
Chapter 13 Trustee

By: _____